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The Influence of Economic Agents in the Lawmaking Process of Environmental Laws: The Case of Waste Electrical and Electronic Equipment (WEEE) Legislation in Europe

Heyd Más*

1. Introduction

During more than thirty years, there have been remarkable developments in the scope of environmental regulation in Europe. The concern for an environmental policy on the rapidly developing society arose as the First Environmental Action Program of the European Community, which was adopted in July 1973. Among other issues brought by the program, tackling the waste management issue was soon recognized as representing a great share of the environmental policy's success for the European countries, which led to the coming into force of the Waste Framework Directive in 1975¹ for addressing the matters related to waste production, prevention and management. The European environmental policy has evolved significantly since then. In 1987, when the United Nations World Commission on Environment and Development released the report *Our Common Future*,² economic, social and environmentally sustainable development was officially introduced worldwide as a major challenge to be pursued and achieved.

Almost as remarkable has been the influence of economic agents exerted on the process of national lawmaking to implement European Directives regarding environmental topics, and it was no different in the case of the transposition and implementation of the Waste Electrical and Electronic Equipment Directives (WEEE Directives). Throughout these processes a number of consultations and working group meetings took place with the involvement of public authorities and

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¹ 75/442/EEC. Council Directive of 15 July 1975 on waste. Considerably amended in 1991 (Directive 91/156/EEC), reaching its most recent revised version in 2008 (Directive 2008/98/EC).

² World Commission on Environment and Development, "Chapter 2: Towards Sustainable Development" in *Our Common Future* <www.un-documents.net/k-001303.htm> accessed 5 March 2014. Usually referred as the 'Brundtland Report' as a homage to the commission's chairperson, then the Prime Minister of Norway Gro Harlem Brundtland.

industry representatives both at the national level and at the Council Working Party on the Environment (WPE).

The market economy³ applied in most societies nowadays is understood as performing by having its decisions based on the behaviour and interactions⁴ of the coexisting forces of “supply” and “demand”. For the purpose of this article, “supply” is here represented by the producers and importers of electric and electronic equipment (EEE) which have the legal responsibility⁵ of organizing and financing the take-back system of end-of-life household EEE collection, treatment, recycling and reuse in a safe manner for human health and the environment. Still in the same context, “demand” stands for consumers of EEE, more specifically, private household consumers, the final users of EEE and, later on, the ones expected to return their end-of-life EEE to allow for the entire take-back system for WEEE to perform successfully.

Within the process of creating regulations for proper management of e-waste, the involvement of economic agents has visibly contributed to a design of rules that come closer to the expectations and possibilities of those to which it applies, allowing for the provisions to be perceived with greater acceptance and become, therefore, more likely to be complied with. At the same time, however, such influence over the legislator should be questioned. In that sense, it is relevant to consider: To what extent should the legislator allow themselves to be influenced by information provided by the very actors it means to regulate? And, above all, who are the actors actually considered to provide them with information? Does it take into account all angles? In order to allow for the legislator to obtain a real understanding of the dynamics to be regulated, one would assume that all players should be invited to participate at the discussion table. This is a concern that rises from the fact that “the economy” influencing laws – on several noticeable occasions – is mostly represented by those whose (powerful) interests are strongly organized – the “supply-side”.

³ See G Hoffman, “Market Economy: Economy in which fundamentals of supply also demand provide signals regarding resource utilization” in *Comparing Economic Systems in the Twenty-First Century*, ed. PR Gregory and RC Stuart (Boston: Houghton Mifflin, 2004) 538.

⁴ See T Gorman, “The Complete Idiots Guide to Economics” (Alpha Books, 2003), 9. “In a market economy, the private-sector businesses and consumers decide what they will produce and purchase, with little government intervention [...] In a command economy, also known as a planned economy, the government largely determines what is produced and in what amounts. In a mixed economy, both market forces and government decisions determine which goods and services are produced and how they are distributed.”

⁵ 2002/96/EC European Directive on Waste Electrical and Electronical Equipment (WEEE) of 27 January 2003. Article 8(1) “Member States shall ensure that, by 13 August 2005, producers provide at least for the financing of the collection, treatment, recovery and environmentally sound disposal of WEEE from private households deposited at collection facilities”.

In an ideal situation, legislation should consider and disclose both sides – supply and demand – in a harmonic way. Instead, the major influence applied by highly organized corporations and their powerful lobbies are heard far clearer and taken into account far deeper than the one produced by consumers. The main stakeholders involved in these dynamics – producers, distributors, treatment operators, recyclers, municipalities and consumers – all have influenced the process according to their own perspectives and interests, however, as will be shown further, in distinctive proportions.

Notwithstanding the connection of some of the economic actors' involvement to the achievement of successful implementation, it must be questioned if better results could be achieved by the participation of all the different groups composing the dynamics of the WEEE management system. The discussion brought by this article is deeply related to one of the main concerns embedded in public trust and public law, as it is not possible to ignore the possible impact of influencing forces over the legislator's performance and their ability to remain impartial to interests of a specific pressure group.

Therefore, this article aims at understanding the dynamics of interest groups that might influence the legislator, taking the case of the WEEE Directives and their national implementation in the United Kingdom and the Netherlands, and discussing the relevance of all economic actors participating in the in the lawmaking process of e-waste laws. The theory of regulatory capture, the group politics theories, and the patterns of political interaction from the social sciences are used as support to understand the dynamics of the issues brought for discussion.

Section 2 will explain the European legislation for management of WEEE, its drafting process (influenced by producers), and the obligations it has established as well as an example of the process by which the WEEE Directives were established. More examples of interest groups influencing legislation will be illustrated for the discussion at hand when section 3 introduces two case studies (respectively): (1) the United Kingdom; and (2) the Netherlands. Section 4 will present the theories of regulatory capture and group politics to understand the phenomenon of interest groups influencing the regulator, and the balanced approach between supply and demand adopted by this article. Final conclusions will be drawn in section 5 where remarks with regard to the influence of economic agents in the lawmaking process of European WEEE Directives and their relevance to public trust in that process, as well as recommendations for better involvement of consumers, aimed at a more balanced representation of interests.

2. In the field of environmental law: the European WEEE directives

Within the discussions about the influence of economic agents over legislation, consumer and environmental laws are the most evident areas. Often, topics that

these laws seek to regulate have in their core the matter of producers' compliance and a history of extensive negotiations during the process of new legislation. To mention a few: product design, programmed obsolescence, and take-back systems for proper treatment, recycling and reuse of waste.

As a response to the side effects of the fast growth of technological innovation, the burden brought to municipal authorities, and the complex mixture of materials and components WEEE contains – some of which are harmful⁶ to human health and the environment, while others are valuable resources to replace raw material production – the European Union designated electrical and electronic waste as one of its priority waste streams. Following the Council Resolution of 7 May 1990⁷ calling for Community-wide action on waste, in 1991 the European Commission initiated the Priority Waste Streams Program which focused on six different waste streams; the Waste Electrical and Electronic Equipment (WEEE) was one of them.

Originally conceived in the late 90's,⁸ the first draft regulation connected the collection and treatment of WEEE with the aims of the Restriction of Hazardous Substances Directive (RoHS) and the Energy using Product Directive (EuP), as complementary to these European Directives. When on 13 June 2000 the European Commission adopted both the proposal for a Directive on Waste Electrical and Electronic Equipment, and the proposal for a Directive on the Restriction of the use of certain Hazardous Substances in electrical electronic equipment, the announced purpose was the need for regulations to be designed to tackle the fast increase of the electrical and electronic equipment waste, and to complement European Union measures on landfill and incineration of this type of waste. Since the first debates started, the aims for the WEEE Directive expanded, including the objective of preventing the generation of EEE and promotion of re-use, recycling and other forms of recovery, as a means to reduce the eliminated amounts of such waste. Naturally, the improvement of the environmental performance of economic operators involved in the treatment of WEEE became part of the focused upon topics. At that time, the EU Commissioner for the Environment, Margot Wallström, acknowledged the electrical and electronic equipment as one of the fastest growing waste streams in the EU – as a result of the fast pace of technological innovation – and how particularly important it was

⁶ Later on the provisions of the Directive, Article 3(1) 2002/96/EC defined “dangerous substance or preparation” as “any substance or preparation which has to be considered dangerous under Council Directive 67/548/EEC or Directive 1999/45/EC of the European Parliament and of the Council.” OJ 196, 16.8.1967, 1. Directive 1999 OJ L 200, 30.7.1999, 1.

⁷ OJ C 122/ 2 18.5.90.

⁸ DS Khatriwal, R Widmer, R Kuehr and J Huisman, “One WEEE, many species: lessons from the European experience”, *Waste Management & Research* (2011) 954.

“to implement the key principles of EU waste management policy, especially the prevention and the recycling of waste, in this area.”⁹

The proposal for a Directive on WEEE has its legal basis in Article 192 TFEU (*ex* Article 175 EC), and is supported by the Fifth Environmental Action Program. The Fifth Environment Action Program¹⁰ was launched with an emphasis on the need for an active role of all economic operators involved in the quest for sustainable development. At that moment, the new policy and action on the environment and sustainable development covered specific themes, which also included the “Management of Waste”. The focus of the Action Program on all economic operators involved in the process, and on significant changes in the patterns of development, production consumption and behaviour, can be further identified in the WEEE Directive. Public authorities, private and public companies, environmental organizations and, in particular, individuals – as citizens and consumers – are mentioned along the articles for the new established procedures proposing drastic changes in all patterns adopted until then.

Even though all actors were equally referred to as relevant players in the WEEE management system being created in Europe at that time, it became clear that some had more room to influence the new legislation than others. The first European Directive on electrical and electronic equipment from 2002 is an example of the dynamics existing between the interests from the stakeholders representing the supply side of the market economy and the drafting of laws. The intense participation of the private-sector to be affected by the WEEE Directive in the negotiations for the Directive led to provisions that would allow for better compliance. For instance, distributors were pressuring the negotiations about the extra costs in the case of an obligation for them to collect so many WEEE. Specific limitations were created in order to satisfy the demands from those actors and still have the Directive creating a free-of-charge take-back possibility for end-users of WEEE. The specific provision explaining the amount and limiting conditions for distributor’s responsibility of collection of WEEE resulted in Article 5(2)(b) creating the “one-to-one basis”: “when supplying a new product, distributors shall be responsible for ensuring that such waste can be returned to the distributor at least free of charge on a one-to-one basis as long as the equipment is of equivalent type and has fulfilled the same functions as the supplied equipment. [...]”.

Another example was the Directive 2003/108/EC which mainly altered the conditions for producer responsibility brought by the WEEE Directive. Initially, the 2002/96/EC WEEE Directive had been published defining the financial responsibility of producers for collection, treatment, recovery and environmentally sound disposal of private household WEEE and other WEEE.

⁹ IP/00/602 European Commission, “Commission tackles growing problem of electrical and electronic waste” Brussels, 13 June 2000.

¹⁰ OJ 1993 C138/5.

However, further studies indicated that the amount was considerably greater than imagined, and the costs and organization capabilities demanded from producers in a given short period of time was no longer reasonable. 2003/108/EC amended Article 9 and limited the responsibility of producers towards the “disposal of WEEE from users other than private households from products put on the market after 13 August 2005”.¹¹

Finally published in the Official Journal in 13 February 2003,¹² the WEEE Directive brought instructions for separate collection of e-waste¹³ from the regular waste in order to improve WEEE waste management, with a distinction between separate collection of WEEE from private households and collection from non-households. Regarding physical responsibility, the Directive did not explicitly identify who should be responsible for setting up the infrastructure. Rather, it required distributors to accept WEEE from consumers on a one-to-one basis when selling new products. Member States could diverge from such requirements in the case of an existing alternative procedure being available for consumers. Concerning financial responsibility, producers were made financially responsible for at least collecting from the collection points onwards. This is an important issue which will be further encouraged at the recast of the Directive, where Member States will receive guidance to stimulate, when appropriate, producers to also finance the costs occurring for collection of WEEE from private households to collection points.

Despite the significant changes in the patterns of collection and disposal brought by the WEEE Directive a few years after its implementation – only an estimated 13% of WEEE going to landfill or incineration – there was a growing concern over the effectiveness and efficiency of the Directive. The EU collection target at the time was of 4 kg WEEE per capita, representing about 2 million tonnes per year, out of around 10 million tonnes of WEEE generated annually in the EU. By 2020, the estimated volume of WEEE will increase to 12 million tonnes. When such figures were compared to the impact of the Directive, the conclusion was that although it represented an important instrument, the Directive still had brought insufficient results, which derived from problems in achieving its main objectives with efficiency. In order to approach those issues, in 2008, based on the experience gathered from stakeholders and Member States during a three-year

¹¹ 2003/108/EC, article 1.

¹² OJ 2003 L 37/24.

¹³ Electrical and Electronic Equipment “means equipment which is dependent on electric currents or electromagnetic fields in order to work properly and equipment for the generation, transfer and measurement of such currents and fields and designed for use with a voltage rating not exceeding 1000 volts for alternating current and 1500 volts for direct current”. As clarified by the DG-Environment, “dependent on electric currents or electromagnetic fields” means that electricity is the primary energy to fulfil the basic function of the product.

review, the European Commission released a staff working paper for a recast of the WEEE Directive.¹⁴

It was concluded that the technical, legal and administrative problems caused by the implementation process of the Directive were resulting in; costly efforts from market actors and administrations, low levels of innovation in waste collection and treatment, unnecessary administrative burdens, and not fully preventing environmental harm. Some of the main issues identified were related to problems in interpretation due to the definitions provided by the Directive, enforcement of the provisions and, as a consequence to the latter, the existence of “free riders” and illegal flows of e-waste. Either by misinterpretation due to lack of clarity on which products fell in the scope of the WEEE Directive, or by clear intent of evading the new rules, producers of electrical and electronic equipment were performing their activities as “free riders”; that is, they did not join nor set up any collection scheme in order to provide for take-back of WEEE and proper treatment, recycling or reuse. In the case of intentional disobedience of the WEEE Directive provisions, the most serious consequence encountered was the practice of illegal shipments of e-waste to countries outside the EU where the legislation for management of WEEE was less strict or non-existent.

In the reports evaluating the implementation of the first WEEE Directive, a recurrent complaint presented by the member states was the short deadline imposed for the national transposition of the Directive. It has been pointed out that due to the lack of time, proper consultations could not be performed.¹⁵ The burdens brought to the national economies due to a rather superficial involvement of producers and distributors in the process of national implementation of the Directive brought attention to the need to look for alternatives to discuss with the “supply-side” which solutions would be preferred and less costly. The engagement of some of the actors in the shaping of the recast was chosen as strategy to improve the results.¹⁶ Above all, producers’ associations, but also the recycling industry had close participation, providing position papers containing valuable data for improved legislation.

Even if the focus was indeed on producers – given that those are the ones, along with distributors, to whom the financing of the take-back responsibility has been

¹⁴ SEC(2008) 2934. Commission staff working paper accompanying the proposal for a Directive of the European Parliament and of the Council on waste electrical and electronic equipment (WEEE) (recast) Summary of the Impact Assessment.

¹⁵ European Commission, “Implementation of Waste Electric and Electronic Equipment Directive in EU 25” (EUR 22231), Joint Research Centre AEA Technology, M Savage (author), S Ogilvie, J Slezak and E Artim (contrib.), (Institute for Prospective Technological Studies 2006) 9-11.

¹⁶ Council of the European Union, Commission Staff Working Paper accompanying the Proposal for a Directive of the European Parliament and of the Council on waste electrical and electronic equipment (WEEE) - (recast) - Impact Assessment (COD) 2008/0241 (16 December 2008) 23.

imposed – a lack of space can be observed for participation of the civil society in the discussions. Relevant information could have been provided by the end-users of EEE and contributed to enhance the provisions concerning take-back logistics to distributors and collection centres, for instance. In addition, great knowledge from academia is ignored, where specialists could contribute with better data and specific knowledge, resulting in better legislation.

3. Transposition of the WEEE directives into national legislation

By the time a Directive comes into force, it is expected from EU member states to follow with procedures for transposition of the text into national legislation and for implementation within the deadlines. As explained by Prechal, according to articles 192 and 288¹⁷ of the Treaty on the Functioning of the European Union (TFEU), Member States are bound to the result prescribed by a directive. Therefore, as a directive is not directly applicable, Member States are expected to adopt transposition measures at the national level in order for it to become fully effective. In that sense, as the main feature of a Directive is the need to be transposed to national law, it allows for Member States to choose the form and method of achieving the adopted results by selecting the most suitable procedures. In fact, Member States are expected to adapt their laws only as much as necessary to reach “the objectives set out in the relevant Treaty provision which serves as the legal base for the directive”¹⁸ and it is “considered essential that the measures taken by the different Member States are applied with the same effectiveness and strictness as in the application of their national law”.¹⁹

According to implementation reports,²⁰ the process of developing legislation for the transposition of the provisions specified in the Directive was strongly troubled by interpretation matters in most of the Member States. Discussions revolving around which products, and therefore, which producers and importers would be

¹⁷ Former article 249 TEC before amendments by the Lisbon Treaty, which came into force in 2009.

¹⁸ S Prechal, *Directives in EC law* (Oxford: University Press 2005) 4.

¹⁹ JH Jans, HHB Vedder, *European Environmental Law: After Lisbon* (Europa Law Publishing 2012) 141.

²⁰ The review process of the implementation of the WEEE Directive included consultation of national implementation reports sent according to deadlines brought by the Directive (reporting period 2004-2006, 2007-2009) Those reports are not made public, however, official reports based on the information brought by the national ones could be accessed: European Commission, Implementation of the Waste Electric and Electronic Equipment Directive in the EU, Technical Report Series, Institute for Prospective Technological Studies (2006). European Commission, Final Implementation Report for the Directive 2002/96/EC on Waste Electric and Electronic Equipment (WEEE Directive) 30 January 2012, Consortium ESWI (2012). This report is a synopsis of national implementation reports in the form of responses by Member States to the questionnaire (contained in the Annex to Commission Decision 2004/249/EC) covering the period 2007-2009.

affected by the new rules, which roles and procedures were mandatory and which were desirable, among others, occurred. Naturally, industry was concerned and reluctant on the implementation of the Directive.

Reaching for an agreement amongst producers proved to be a challenging task, in addition to one extra complicating factor: time shortage. The deadline for all the rules for the establishment of national WEEE systems to be fully transposed to the national legal framework was considered short by most Member States. The general complaint presented both by national authorities and producers referred to the uncomfortable position of having to make fast, important decisions while not enough data was available to lead to a clear understanding of the consequences of different approaches, or even to properly evaluate the options. As one example of the issues at hand, in some countries the stakeholders pressured for the creation of national compliance organizations, while others sought for a more market-based approach, which meant the incorporation of a clearing house model. Member States with a strong Chamber of Commerce and tradition of centralized and collaborative decision-making tended to have producers presenting a united negotiated position to the government after resolving such issues amongst themselves. However, this was not the case for most of Member States.²¹

As a result, seeking to engage producers, importers and distributors for public consultations was adopted by the Member States during the process of drafting the national laws responsible for implementing the new Directive.

3.1 The British transposition of the WEEE directives

The UK was one of the last Member States to implement the WEEE Directive. As explained by the British Government, the WEEE Directive which was first agreed in 2003 proved to be a rather complex and costly text to be implemented. On 14 December 2005 the Government's Energy Minister, Malcolm Wicks, announced that the implementation of the Directive in the UK would have to be delayed until 2007 as a consequence of the Government's commitment to implement it in a way that would enhance the environmental benefits while minimizing the costs to businesses.

The UK, since the coming into force of the first WEEE Directive, has been constantly revising and enhancing its WEEE Regulations. In those procedures, the participation of producers and distributors in the drafting of the first WEEE Directive has been notorious,²² however, little is known from the positions and requests of consumers of electrical and electronic equipment.

²¹ European Commission (n15) v.

²² For instance, foreword by Rt Hon Michael Fallon MP Minister of State for Business and Enterprise at the 2013 Public Consultation: "The proposed changes to the WEEE system are an important part of that commitment. They are a direct response to concerns expressed by producers of electrical and electronic equipment about the cost of

The low participation of consumers has shown small figures of compliance with the take-back regulations for returning WEEE to the distributors or for properly disposing of their e-waste according to municipal rules. As a strategy to reach consumers and achieve better results of collection, the government took over the task of developing the information campaigns – initially a task for producers and distributors. Observing the public consultations launched for the transposition of the Directives into British legislation, the focus on producers, and business in general, becomes quite evident. For instance, although the last public consultation²³ concerning WEEE legislation had been performed by the Department for Business, Innovations & Skills – responsible for supporting businesses and consumer protection – the questions were clearly directed to a target audience of producers. The questions listed in the consultation regarded only responsibilities assigned for producers, importers and distributors, the technical definitions, and procedures that those implied. Even though the base of the WEEE system relies on end-users properly disposing of their end-of-life electric and electronic appliances (WEEE), and that the collection of historic WEEE is financed by a visible fee included in the prices of new EEE, no consultations directed to the consumers could be found.

All participants to the consultation were representing interests of businesses, including the only two names of individuals that could be identified in Annex A (referred to in the next paragraph) as they were identified as directors of businesses directly involved with the distribution of EEE. According to the summary of responses:

We received 256 responses to the consultation. A full list of respondees is attached at Annex A. The largest response came from producers of EEE (Electrical and Electronic Equipment) with 100 respondents identifying themselves as producers. This was followed by local government with 49 responses. 29 trade bodies also responded along with 22 Producer Compliance Schemes (PCS), 17 distributors of EEE, 16 WEEE treatment facilities, 16 charities or social enterprises, 14 electrical reuse organisations and 11 waste management companies (WMCs). The remainder of responses came from individuals, central government and staff associations.²⁴

compliance within the existing regulations.” Department for Business Innovations & Skills, Implementation of the WEEE Recast Directive 2012/19/EC and changes to the UK WEEE system (April 2013) 4.

²³ Department for Business Innovation & Skills, “Implementation of the WEEE Recast Directive 2012/19/EU and Changes to the UK Waste Electrical and Electronic Equipment (WEEE) System: Consultation”, April 2013 (2013).

²⁴ Department for Business Innovation & Skills, “Implementation of the WEEE Recast Directive 2012/19/EU and Changes to the UK Waste Electrical and Electronic Equipment (WEEE) System: Summary of Responses to Consultation”, August 2013 (2013) 6.

Perhaps questions concerning the preferences of consumers for options of disposal of old EEE (such as locations, schedules, types of WEEE), effective communication channels, and information being made available, among other factors, would contribute to an enhancement of the results of the WEEE system. Ensuring a greater involvement of consumers in the lawmaking process would increase their awareness of the essential role they have in the structure of the WEEE system. When end-users are not aware or engaged with the take-back system of WEEE, it leads to poor collection rates, which, in turn, result in unsatisfactory treatment, recycling and reuse rates.

3.2 The Dutch transposition of the WEEE directives

In 2004, the European WEEE Directive introduced legislation for e-waste take-back systems which were to be implemented into Member States' national legal framework no later than August 2006. Apart from Greece, the Netherlands was the only Member State to meet the deadline, achieved when the WEEE Directive was transposed to national law on 13 August 2004, causing no major impact caused on the Dutch system for WEEE Management. The explanation for a much simpler process than in most of the EU lies in the fact that the Netherlands was one of the pioneers of e-waste legislation, having had the concept of producer responsibility of electrical and electronic equipment exist in Dutch regulations since 1999, when a nation-wide system for the collection and recycling of end-of-life EEE was set up. The Dutch government²⁵ adds to the explanation the argument that the Directive was broadly inspired by the Dutch approach which, to some extent, contributed to a rather simple adaptation process of the national laws.

The Disposal of White and Brown Goods Decree, published in 1998,²⁶ established the requirements for the system to be based on; legislation which outlined the responsibilities of the producers with regard to waste electrical electronic equipment. However, there has been a strong influence from producers in the history of this decree. In 1989, white and brown goods were already identified as a special waste category in Dutch environmental policy. Further, in 1992 the Ministry of Housing, Spatial Planning and the Environment (VROM), in the context of attempts to reduce waste and the recycling of materials, sought an agreement with producers and suppliers of white and brown goods concerning the disposal of their products. From 1992 to 1994, a process of intense negotiations

²⁵ Ministerie van Infrastructuur en Milieu, "Handboek EU-milieubeleid en Nederland. De omzetting in nationale regelgeving" <<http://www.infomil.nl/onderwerpen/integrale/handboek-eu/afval/afgedankte/omzetting-nationale/>> accessed 13 April 2015.

²⁶ Staatsblad van het Koninkrijk der Nederlanden, "Jaargang 1998 Nr. 238 Gepubliceerd op 28 april 1998. Besluit van 21 april 1998, houdende vaststelling van regels voor het na gebruik innemen en verwerken van wit- en bruingoed" (Besluit verwijdering wit- en bruingoed) http://wetten.overheid.nl/BWBR0009561/geldigheidsdatum_18-03-2015# accessed 13 April 2015.

took place among members of the target group, the government, and third parties. Nevertheless, the goal of the process – the signature of a covenant – was not achieved. The outcome was influenced by the fact that producers were aware of the rising concern of other Member States on the matter. To settle for Dutch legislation on the matter would most likely force producers to adapt twice, thus leading to the choice to wait for homogeneous legislation defined at a European level, instead of having to adjust to a Dutch law which soon would be replaced and which would lead to extra costs.

Producers managed to prevent the new regulations at that moment. Even so, despite the frustrated attempt to sign an agreement with producers, the establishment of national regulations for an electronic waste management system came a few years later. Pressured by the need of regulating the matter and the EU Directive to come – which would represent a difficult process of transposition unless an already ongoing system was already established – the government had this strategy clear in its agenda and followed with the intent of regulating the management of WEEE and drafted the Disposal of White and Brown Goods Decree. The Decree came into force on the 1st of January 1999 and obliged the sector to set up a system for the disposal of white and brown goods in cooperation with the municipal authorities and distributors.²⁷

In the coming years, a considerable amount of effort from the government for consulting and involving producers took place. This was due to a great concern on effective compliance of producers to the new regulations, and therefore, it became a main focus of the new Dutch environmental policy at the time.

4. Supply, demand, and their influence on new legislation

The increase in productivity and standards of living during the past two hundred years have far exceeded those that had been reached so far by the previous two millennia. Markets have played a central role – though so have governments – on this unprecedented speed. The power of markets in the global scenario, “whether for good or evil”, is undeniably vast. According to key economic concepts, market economies are driven by the main forces of supply and demand,²⁸ and a counterbalancing reaction to the power that markets represent is the practice pursued by governments to repeatedly have them controlled and moderated, as much as reality allows for. The focus has been to have markets working to the benefit of most citizens and, for this, laws have been created and enhanced,

²⁷ H Bressers, E Immerzeel and JJ Ligteringen, “The Disposal of White and Brown Goods” in M. de Clercq (ed.), *Negotiating Environmental Agreements in Europe: critical factors for success* (Edward Elgar Publishing 2002) 218-240.

²⁸ See e.g. PR Gregory and RC Stuart, “Comparing Economic Systems in the Twenty-First Century” (South-Western CENGAGE Learning 2004).

dedicating special concern for consumer and environmental legislation.²⁹ Nevertheless, this has been a never-ending struggle.

Naturally, in the lawmaking process for new legislation considerable pressure from competing interests is present every step of the way: from work group meetings and debates to voting procedures. Stakeholders such as governments, industry, local communities, and ecologists play greater and smaller roles in shaping new laws in the most favourable possible way to protect the interests they stand for.

The balanced approach for the involvement of supply and demand in the dynamics of lawmaking in this field of law derives from empirical observation of the cases mentioned in this article, connected by the concepts of “bounded rationality”³⁰ and the political discussion of “democratic deficit”.³¹ The observation that competing wills are not always perceived nor granted equally, but instead are recognized according to the level of influence of its players, lead to an observation of whether balance would be desirable or what the risks are of ignoring the balance. In theory, the regulator assures that the lawmaking process will produce legislation in the public interest. In reality, the outcome can be good regulation that is complied with, but it may also result in a representation of the interests of those with the resources and ability to advance their interests over other groups.

The development of modern environmental law has been linked to the economic development of society. In this sense, the significance of engaging industry in the discussions must not be underestimated, especially if one considers that their participation can possibly assert more influence – and more adherence – on an environmental issue than a treaty ever could. As a consequence, States are more likely to comply with the demands presented by corporations due to their essential role in the economic development of a national market economy. At the same

²⁹ JE Stiglitz, “Introduction” in *From Cairo to Wall Street: Voices from the Global Spring* (The New Press 2012) 19.

³⁰ Bounded rationality is a school of thought about decision making that includes the subjective expected-utility variant of rational choice to the comprehensively rational economic and decision theory models of choice (integrating risk and uncertainty to the model). The model of “Bounded Rationality” was brought by Herbert A. Simon (in the 1940s and 1950s) who critiqued the existing theories of public administration and proposed a new approach for the study of organizational decision making. A major implication of the approach is that behavior is determined by the mix of incentives facing the decision maker, as explained by Jones. BD Jones, “Bounded Rationality”, *Annual Review of Political Science* 2:297–321 (1999) 298–299.

³¹ Throughout the years, trust levels seem to have eroded in a number of democratic governments. The existence of a democratic deficit is a result of the fact that expectations about democracy have continued to rise, while satisfaction about the way democracy functions has, at best, remained the same. For more see also P Norris, “Democratic Deficit: Critical Citizens Revisited” (Cambridge University Press 2011).

time, industry can also make environmentally friendly processes mandatory, thereby creating a beneficial effect on environmental issues.³²

Under the understanding that the supply is already structured in a successful way to promote its private interests, Coston argues that, “ideally, support to the demand side would assure that there is sufficient competition among these special interests that capture of state and local resources and power is prevented.”³³ Certainly the strength and effectiveness of the demand side will depend on the ability of civil society actors to aggregate interests and articulate preferences, combined with the creation and strengthening of institutions that bridge civil society actors and lawmakers. With respect to civil society and its role played in democracy, a healthy and active civil society is a necessary complement to political representation at the regional and national level.

Since the early years of the twentieth century, there have been attempts to understand the interest groups phenomenon and to predict actions and outcomes. The behaviour of different pressure groups are deeply connected to public trust in policy, and naturally, the lawmaking process. It has been a concern of theories in the field of sociology and economics, which have discussed the dispute of groups of interests and their influence over policies in the social sciences. The next topic approaches these theories in order to bring some light to the discussion brought by the influence of the manufacturers of electric and electronic equipment in the cases mentioned in section 3.

4.1 Regulatory capture theory

One of the consequences of globalization is that governments have become far more vulnerable to different kinds of economic pressure. Even though they continue as significant players, dealing with global and local forces, they are no longer the only relevant players in the international arena ever since multinational corporations have been established. In this changing scenario, levels of public and private power are layered by networks of different actors, and rules derive not only from states, but also from private entities.³⁴

Regulatory capture is one of the theories that approach the existing issues mentioned in the previous section of this paper. Over the years it has been adapted

³² M Eving-Chow and D Soh, “Pain, Gain, or Shame: The Evolution of Environmental Law and the Role of Multinational Corporations”, *Indiana Journal of Global Legal Studies*, Vol. 16, Issue 1 (2009) 195-222, 207.

³³ JM Coston, “Administrative avenues to democratic governance: the balance of supply and demand”, *Public Administration and Development* 18, 479-493 (1998) 483.

³⁴ AC Aman, “Globalization, Democracy, and the Need for a New Administrative Law”, *Indiana Journal of Global Legal Studies*, Vol. 10, Issue 1 (2003) 125-155, 136.

and taken a broader view³⁵ from its original contribution, but nonetheless, it is a valid theory to explain and understand the influence of interest groups in regulations. Laffont and Tirole³⁶ argue that the origin of the regulatory capture theory can be traced back to Marx and to the early twentieth century political scientists' view that big businesses control institutions.

According to one of the main authors on regulatory capture – George Stigler – regulation, as a rule, is acquired by the industry and is designed and operated primarily for its benefit.³⁷ The explanation is that regulatory authorities mostly rely on information provided by the firms they regulate since it is virtually impossible for the regulatory authorities to have as much information as the firms in any other way than that. This practice provides an advantage for the firms to find ways to conduce the regulators to enforce regulations which, in the end, protect profits. In that sense, regulators find themselves “captured” by the very firms they are supposed to regulate. Therefore, although regulation – in its ultimate goal – is about controlling market entry, it is still made by politicians who make their decisions based not only on public policy goals,³⁸ but also on lobbying, here understood in a broader sense as organized groups promoting their interests.

For instance, a classical example is the case of regulations for appliance efficiency standards, more specifically, for washing machines.³⁹ In the United States,

³⁵ As explained by Laffont and Tirole, Stigler's theory inferred that members of an industry have more incentives than dispersed consumers with a low per capita stake to organize themselves and affect the regulatory outcome. The emergence of some powerful consumer groups and the regulatory experience of the seventies led the academic profession to take a broader view of Stigler's theory, that allows government officials to arbitrate among competing interests and not always in favor of business. JJ. Laffont and J. Tirole, “The politics of government decision-making: a theory of regulatory capture”, 106 (4) *The Quarterly Journal of Economics* (1991) 1089-1127, 1090.

³⁶ JJ. Laffont and J. Tirole, “The politics of government decision-making: a theory of regulatory capture”, 106 (4) *The Quarterly Journal of Economics* (1991) 1089-1127, 1089.

³⁷ G Stigler, “The Theory of Economic Regulation”, A Schiffrin and E Kircher-Allen (eds), *The Bell Journal of Economics and Management Science* 2(1) (1971) 3–21.

³⁸ Birkland's definition for public policy “as a statement by government – at whatever level – of what it intends to do about a public problem. Such statements can be found in the Constitution, statutes, regulation, case law (that is, court decisions), agency or leadership decisions, or even in changes in the behavior of government officials at all levels. [...] Because we also define public policy as what government chooses not to do, the lack of a definitive statement of policy may be evidence of an implicit policy.” TA Birkland, *An Introduction to the Policy Process: Theories, Concepts and Models of Public Policy Making* (Taylor & Francis 2011) 9.

³⁹ Example taken place in the United States of America, concerning regulations for washing machines which were mostly drafted by the manufactures. Mentioned by Former Government official and professor at George Washington University: Susan Dudley. S Dudley, “What is Regulatory Capture” (The Center for Economic

manufacturers – by making use of their lobbyists – pressured for new regulations that would forbid washing machines which made use of too much water. The new regulation brought many of the ideas and arguments presented by the manufactures’ lobbyists and still seemed to be favouring consumers and the environment. However, this is only at a first sight, as with closer analysis of the situation reveals, the new machines that actually did not use too much water were significantly more expensive than the pre-existing ones which used more water. Before the new regulations, when consumers were presented with the low water-consumption machines – a more expensive product – they were not interested in the product due to its high pricing, and preferred the cheaper ones which used more water. With the ban of the cheaper ones – as those did not achieve the new water consuming standards – consumers were deprived of their freedom of choice. At the same time, manufacturers’ concerns regarding consumer preference were no longer a problem.

As one may learn from this example, it is possible that even though regulations enacted by regulatory agencies may seem to bring benefit to the consumer, if their evolution processes are observed closer, their implications will evidence favouring private industries rather than public interest. Real examples, such as the one mentioned above, are evidence that Stigler’s arguments in the theory of regulatory capture can be considered to understand current situations.

A possible contribution to be considered for the prevention of “capture” of public institutions could be, therefore, the use of instruments to include consumers’ information (contributions) along with the data provided by industry (producers). Such instruments would provide the legislator with more complete – and balanced – information. The relevance of the information brought to the legislator relates to the concept of “bounded rationality” and the theories explained in the next section of this article. In the same vein, as explained by Coston:

The essence of effective democratic governance is achieving an appropriate balance among interested parties such that the losses are minimized. Such a compromise is not possible if the state lacks the capacity to respond to the demands collectively, rather than putting out fires for short-term gain or responding only to the most vocal powerholders.⁴⁰

To make a strategic institutional structure available to favour more room for citizens – “the least vocal powerholders” – to have their interests represented and balance the sometimes excessively influencing power of industry that could lead to regulatory capture, these are issues to be considered, and future studies could focus on possible structures to approach the matter exposed here.

Liberty 2012) <http://centerforeconomicliberty.blogspot.de/2012/01/what-is-regulatory-capture.html> accessed 29 July 2015.

⁴⁰

Coston (n33) 486.

4.2 Group politics theories

Group politics theories begin by acknowledging the fact that the State is composed of actors, both institutional and non-institutional ones, and these are a product of a complex set of historical, social-economic, and political, among other, contexts. The theories also rely on the idea of the existence of different groups with competing sets of interests having the State acting as a control mechanism.

One of the central matters of policy-making is the need for decisions to be made, decisions which will also result in lawmaking. However, the process for making decisions is based on information and, as described by the concept of “bounded rationality”,⁴¹ information is limited, especially considering that within the reality of different groups disputing, only a few are invited to join the discussion and provide their piece of information. As explained by the incremental models,⁴² decisions tend to be made on the basis of inadequate information and low levels of understanding. The outcome, as expected, could be no different: decisions based on information – and interests – provided only by “an elite” of groups.⁴³

Although in a broader scope, Coston explained the problems of allowing for participation of more actors other than the public authority in a very enlightening way.

It would seem that government performance can be enhanced by delegating functions to more efficient and effective actors and by entertaining the demands of constituents. So what's the problem? A serious danger exists that the state may come to be perceived as the problem only, and not a source of solution and/or contribution. The reality is not so simple. Yes, delegation or privatization can enhance efficiency and effectiveness, but perhaps not in all circumstances and not for all functions. Yes, public sector performance can be enhanced through pressure from its constituents, if there are credible options for exit and voice and, especially, if government has the capacity to respond to these demands. In short, while citizens need

⁴¹ The concept of bounded rationality considers that decision makers work under three unavoidable constraints: (1) only limited, often unreliable, information is available regarding possible alternatives and their consequences, (2) human mind has only limited capacity to evaluate and process the information that is available, and (3) only a limited amount of time is available to make a decision. Therefore, even individuals who intend to make rational choices are bound to make “satisficing” (rather than maximizing or optimizing) choices in complex situations. Proposed by the US Nobel-laureate economist Herbert Simon (1916-2001) in his 1982 book “Models Of Bounded Rationality And Other Topics In Economics.” <<http://www.businessdictionary.com/definition/bounded-rationality.html#ixzz3hNznQVWs>> accessed 30 July 2015.

⁴² For more information see D Braybrooke and C Lindblom, *A strategy of decision: policy evaluation as a political process* (Collier Macmillan 1963).

⁴³ A Heywood, *Politics* (Palgarve Macmillan 2002) 401.

to demand, governments need to respond; both are capable of some supply; and none of these should be taken for granted.⁴⁴

In an ideal scenario, either no interest group should be providing information for the decision-makers – who in turn would be responsible for producing their own sources of neutral information – or, what is proposed by pluralist theories,⁴⁵ all interest groups are given equal ability to participate in the debate. In the same direction, Heywood⁴⁶ explains that the core theme of pluralism is that political power is fragmented and widely dispersed. Consequently, decisions are made through a complex process of bargaining and interaction that ensures that the views and interests of a large number of groups are taken into account. This bargaining and involvement of industry into environmental legislation has been mostly successful and resulted, in most cases, in good legislation and good compliance.⁴⁷ However, when legislation and its compliance also includes actors that were not part of the negotiations, a “sub-optimal” implementation level is noticed.⁴⁸

Arthur Bentley was one of the first and most prominent authors to develop a pluralist “group theory” by emphasizing that organized groups are the fundamental building blocks of the political process. According to Bentley, “[w]hen the groups are adequately stated, everything is stated”.⁴⁹ The development of neo-pluralism and more arguments to study the phenomenon carried on as the power of major corporations (business groups) arising since the 50’s increased the concerns of political scientists focusing on the existence of a privileged position enjoyed by some business groups, and the negative effect it causes to democratic societies.⁵⁰

5. Conclusions

Based on the observations from both the drafting process of the WEEE Directives, and their national implementations in the Netherlands and the United Kingdom, in addition to the interpretation brought by the theories explained in section 4, it becomes clear that interest groups are strong players capable of influencing the

⁴⁴ Coston, (n33) 480.

⁴⁵ R Hague and M Harrop, *Comparative Government and Politics* (Palgarve Macmillan 2004) 177.

⁴⁶ Heywood (n43) 273 – 274.

⁴⁷ See JK Levit, “Bottom-up lawmaking: The Private origins of Transnational Law”, *Indiana Journal of Global Legal Studies*, Vol. 15, Issue 1 (2008) 49-73.

⁴⁸ See examples of the implementation in the UK and the Netherlands mentioned further in this article.

⁴⁹ The text makes reference to A Bentley, “The Process of Government: a study of social pressures”, (The University of Chicago Press 1908) 208.

⁵⁰ R Dahl, *Who Governs?* (1961). For “neopluralism” originating from Dahl’s pluralism model also see JK Galbraith, *The New Industrial State* (1985) and CE Lindblom, *The Intelligence of Democracy* (1965).

drafting process of new legislation for e-waste. It is also noticeable that the strongest and most organized players promoting their interests on the WEEE systems – producers and, to some extent, distributors – have caused relevant influence in the processes that have led to the WEEE Directives and national laws for e-waste in the Netherlands and the United Kingdom. In that sense, the power of pressure groups over the legislator should be of greater concern and monitored, even though when seeking to protect their own interests it has been noticed that producers can also promote positive effects on legislation on environmental protection (e.g. regulations on washing machines).

Consumers do not directly influence the legislation making process of e-waste regulations at the same pace or strength that producers and distributors do. As explained by the theories, with the instruments currently available to each side (supply and demand), it is easier to lobby for the interests of few than interests of many. Although the demand side of the market economy – for purposes of this article, understood as the consumers of EEE – can influence legislation by their preferences in shopping, this, when added to the democratic elections of their representatives, is still of minor power when compared to the performance of big firms (producers). There is great difficulty for direct representation to become stronger⁵¹ and organized. It has been noted that it is far more unlikely for consumers to be invited by the regulator to the discussion table and directly⁵² participate in the negotiations of new regulations.

So far, in the dynamics of the WEEE system, it has been observed that even though consumers are of key importance for the success of the system itself, they have not been directly involved in the shaping process of its laws. In order for a more balanced representation of interests to be reached, it should be of concern that all are present to contribute to the discussions. A model somewhat closer to the framework proposed by the pluralist model, where all groups would be given room at the discussion table, to provide information and, along with it, to promote their interests in a direct way, seems to offer the most balanced representation of supply and demand sides of the economy in economic decisions and new regulations.

⁵¹ The influence power of an interest group, as stated by Rod Hague and Marin Harrop, relies on four of its main features: sanctions, legitimacy, membership and resources. Namely, those represent 1) the ability of a group to invoke sanctions (such as take investments elsewhere or go on strike); 2) a high degree of legitimacy, prestige, is more likely to prevail on particular issues; 3) high penetration (high density of membership) increases influence; 4) although resources available are relevant, “money talks but not always loudly”. R Hague and M Harrop, “Comparative Government and Politics” (Palgarve Macmillan 2004) 175.

⁵² On regulatory capture theory members of industry have more incentives than dispersed consumers with a low per capita stake to organize to exercise political influence.

Therefore, better representation of the interests of consumers, who are also economic agents and relevant pieces of the dynamics of the WEEE management system, could increase the success rates of collection, treatment, recycling and reuse of WEEE, as compliance levels could increase. In the same direction, it is important to remember the central role of consumer protection within the EU set out in Article 153 of the Treaty.⁵³ According to the Treaty, “the interests of consumers at EU level require that all markets across the European Member States (collectively the "internal market") work effectively. For the market to work effectively it should be competitive and deliver a fair deal for consumers. A competitive and efficiently regulated market provides the greatest opportunity for business and delivers the choice, low prices, innovation and better service that consumers desire.”⁵⁴

These statements show that environmental regulations are strongly influenced by the interests and negotiations among the stakeholders involved. A level playing field to be offered for all presents itself as a way of approximating regulation to all players in the market economy, not only the strongest ones (the 'supply side of the market economy'). A change in these dynamics could provide more positive results for the WEEE management system and place it a step closer to a more symbiotic interrelationship between (environmental) law and the economy.

⁵³ OJ C 325, 24/12/2002 0101. Treaty establishing the European Community - Part Three: Community policies - Title XIV: Consumer protection - Article 153 - Article 129a - EC Treaty (Maastricht consolidated version) Article 153. In order to promote the interests of consumers and to ensure a high level of consumer protection, the Community shall contribute to protecting the health, safety and economic interests of consumers, as well as to promoting their right to information, education and to organize themselves in order to safeguard their interests. 2. Consumer protection requirements shall be taken into account in defining and implementing other Community policies and activities. 3. The Community shall contribute to the attainment of the objectives referred to in paragraph 1 through: (a) measures adopted pursuant to Article 95 in the context of the completion of the internal market; (b) measures which support, supplement and monitor the policy pursued by the Member States. 4. The Council, acting in accordance with the procedure referred to in Article 251 and after consulting the Economic and Social Committee, shall adopt the measures referred to in paragraph 3(b). 5. Measures adopted pursuant to paragraph 4 shall not prevent any Member State from maintaining or introducing more stringent protective measures. Such measures must be compatible with this Treaty. The Commission shall be notified of them.

⁵⁴ European Commission, Health and Consumers “Safeguarding Consumers' Interests” <http://ec.europa.eu/consumers/archive/cons_int/index_en.htm> accessed 23 July 2015.